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FILE: EAC-02-136-50856 Office: VERMONT SERVICE CENTER Date:

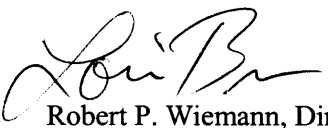
IN RE: Petitioner:  
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
for Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a telecommunications research and development company. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage.

On appeal, counsel submits a brief.

Regulations at 8 C.F.R. § 204.5(g)(2) state in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 16, 2001. The beneficiary's salary as stated on the labor certification is \$65,825 per year.

With the initial petition, counsel submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated May 22, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE specified the petitioner's 2001 federal income tax return and evidence of wage payments to the beneficiary for 2001, if any.

In response to the RFE, counsel submitted the petitioner's 2000 and 2001 Form 1120, U.S. Corporation Income Tax Return. Counsel also submitted the beneficiary's Form W-2 Wage and Tax Statements for the years 2000 and 2001. The tax return for 2000 preceded the priority date and is therefore, of limited value to the determination of the petitioner's ability to pay the proffered wage. The tax return for 2001 reflected a taxable income before net operating loss (NOL) deduction and special deductions of -\$6,080,524.00. Schedule L of the return reflected current assets of \$273,032.00; current liabilities of \$877,370.00; and, net current assets of - \$603,538.00. The W-2 for 2001 reflected that the petitioner paid the beneficiary \$40,975.03 during 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states that as a research and development company, the petitioner has little, if any, income to operate and pay salaries and must rely on its ability to raise additional capital and continuous funding to operate. Counsel states that the director failed to consider the substantial amount of wages paid (\$1,337,541.00 during 2001) and that the substantial compensation to officers (\$786,410.00 during 2001) could be used to pay employees salaries.

Counsel's assertion that the petitioner must rely on continuous funding to pay wages and salaries, not income, and that Citizenship and Immigration Services (CIS) must consider such funding is not persuasive. In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Moreover, we note that any venture capital or other cash has already been considered as part of the petitioner's current assets. We cannot, however, consider current assets without considering the current liabilities that offset those assets.

The proffered wage is \$65,825.00 a year. In 2001, the beneficiary was paid \$40,975.03. Even prorating for the portion of the year after the priority date (71 percent), the petitioner must demonstrate an ability to pay \$46,735.75 in wages for the remainder of 2001, or an additional \$5,760.72 than it did pay the beneficiary that year. Given the petitioner's net loss and negative net current assets for 2001, it is concluded that the petitioner could not pay the proffered wage during 2001.

Counsel's assertion regarding the possibility of using the distribution of officer compensation to pay employees salaries, is not supported by the record. The record does not demonstrate that any funds were diverted during 2001 to pay the proffered wage. Moreover, the officer compensation for 2001 was only \$687,410, far less than the petitioner's more than \$6 million net loss for that year, a loss that does not include any carry over of loss from previous years.

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.